

No. 76-365

Supreme Court, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1976

SAMUEL H. SLOAN, ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION  
IN OPPOSITION

ROBERT H. BORK,  
*Solicitor General,*  
*Department of Justice,*  
*Washington, D.C. 20530.*

DAVID FERBER,  
*Solicitor to the Commission,*

FREDERICK B. WADE,  
*Attorney,*  
*Securities and Exchange Commission,*  
*Washington, D.C. 20549.*

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**OPINIONS BELOW**

The orders of the court of appeals dismissing petitioners' appeals (Pet. App. 1a-6a) are not reported and were not accompanied by an opinion. Two opinions of the district court in one of the cases (Pet. App. 11a-14a, 23a-32a) are reported at 369 F. Supp. 994 and 369 F. Supp. 996. An additional opinion in the same case (Pet. App. 15a-22a) is unreported. The opinion of the district court in a second case (Pet. App. 35a-41a) is reported at 64 F.R.D. 648. The oral opinion of the district court in the third case (Pet. App. 83a-84a) is unreported.

**JURISDICTION**

The judgments of the court of appeals were entered on January 7, 1976 (Pet. App. 1a-6a). A motion for reinstatement of the appeals was denied on March 15, 1976



(Pet. App. 7a-8a). Petitioners' motions for reconsideration of the court's denial of their motion for reinstatement, and for rehearing with a suggestion for rehearing *en banc*, were denied on April 13, 1976 (Pet. App. 9a). On June 23, 1976, Mr. Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including September 10, 1976; the petition was filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### QUESTION PRESENTED

Whether the court of appeals erred in dismissing the appeals in these civil actions while petitioner Sloan was outside the United States, and thus avoided being arrested pursuant to an order directing his imprisonment for civil contempt in one of these actions, and in refusing to reinstate the appeals after petitioner had purged himself of contempt.

#### STATUTES INVOLVED

The appeals at issue here arose from actions brought by the Securities and Exchange Commission pursuant to Section 21(e) of the Securities Exchange Act of 1934, 48 Stat. 881, 900, as amended, 15 U.S.C. 78u(e), which provided in pertinent part at the time the actions were brought as follows:

(e) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule or regulation thereunder, it may in its discretion bring an action in the proper district court of the United States, the district court of the United States for the District of Columbia, or the United States courts of any Territory or other place subject to the

jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. \* \* \*

A similar provision now appears at Section 21(d) of the Securities Exchange Act of 1934, as amended, Pub. L. 94-29, 89 Stat. 154, 15 U.S.C. (Supp. V) 78u(d).

#### STATEMENT

In the first of the judgments of which review is sought (Pet. App. 1a-2a), the court of appeals dismissed an appeal from an injunction obtained by the Securities and Exchange Commission against petitioners, Samuel H. Sloan & Co., a broker-dealer in securities registered with the Commission, and its proprietor, Samuel H. Sloan (Pet. App. 33a-34a). On January 7, 1974, after a trial on the merits, the district court had found that petitioners had willfully violated Sections 15(c)(3) and 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78o(c)(3) and 78q(a),<sup>1</sup> and various rules promulgated thereunder, and that "[t]he issuance of a permanent injunction \* \* \* [was] necessary to protect the public against the continuation or repetition of the above described violations and, unless permanently enjoined, there is a likelihood that the defendants will continue to engage in violations of the [Securities] Exchange Act and the Rules promulgated thereunder" (Pet. App. 32a).

The second judgment of which review is sought (Pet. App. 3a-4a) dismissed an appeal from an order denying Mr. Sloan's petition (a) to intervene in an enforcement

<sup>1</sup>Sections 15(c)(3) and 17(a) of the Securities Exchange Act of 1934, as they existed prior to the enactment of the Securities Acts Amendments of 1975, Pub. L. 94-29, are set forth at Pet. 11-12.

action brought by the Commission against other persons and (b) to vacate permanent injunctions (Pet. App. 42a-61a) that had been entered in that action with the consent of the defendants directly affected. The district court had held (Pet. App. 38a-39a) that, since the consent judgments would have neither *res judicata*, collateral estoppel nor *stare decisis* effects upon the action Mr. Sloan proposed to bring against those defendants, he was not entitled to intervene in the action as of right. The district court also held, *inter alia* (Pet. App. 39a-41a), that, because intervention would prejudice the parties and the public by upsetting a carefully negotiated settlement, which has been "worked out \* \* \* to ensure the defendants' compliance with the securities laws and to protect the public from further violation of those laws," he was not entitled to permissive intervention.

The third judgment of which review is sought (Pet. App. 5a-6a) dismissed an appeal from a preliminary injunction obtained by the Commission against petitioners on January 17, 1975. The injunction from which the appeal was taken, *inter alia*, (1) enjoined petitioners from violating Section 15(c)(2) of the Securities Exchange Act, 15 U.S.C. 78o(c)(2), and Rule 15c2-11, 17 C.F.R. 240.15c2-11, by "initiating over-the-counter quotations \* \* \* while and at a time \* \* \* [they] failed to possess, maintain, preserve or make reasonably available upon request to any person \* \* \* those items of information required to be in the possession of a broker-dealer before a broker-dealer may lawfully publish any such quotation \* \* \*" (Pet. App. 88a-89a); and (2) required petitioners "to permit immediate examination in an easily accessible place by \* \* \* representatives of the Commission of the books and records of Samuel H. Sloan and Samuel H. Sloan & Co. \* \* \*," as required by Section 17(a) of the Securities Exchange Act and Rule 17a-4 promulgated thereunder (Pet. App. 88a).

Despite the latter order, petitioner Sloan persisted in his refusal to permit members of the Commission's staff to inspect the books and records of Sloan & Co. The district court on September 3, 1975, adjudged Sloan in civil contempt.<sup>2</sup> The order granted Sloan 20 days to purge himself of the contempt by permitting immediate examination by representatives of the Commission of the books and records of Sloan & Co. and directed that he appear before the court for sentencing on September 26, 1976, should he fail to purge himself of the contempt by that time.<sup>3</sup>

On the morning of September 26, 1975, Sloan appeared before the court of appeals in connection with an application he had filed for a stay of the civil contempt order. Although the court of appeals denied the application for a stay in his presence, Sloan failed to appear before the district court that afternoon for sentencing. He subsequently left the United States for Iceland (see Pet. App. 104a-105a).

On February 2, 1976, Sloan appeared before the district court and agreed to permit Commission representatives to inspect the books and records of Sloan & Co. at his mother's residence in Lynchburg, Virginia. Pending that inspection, he was remanded to the Metropolitan Correction Center in New York City. On February 4, 1976, members of the Commission's staff inspected books and records of Sloan & Co. in Lynchburg. Later that day, Sloan and counsel for the Commission again appeared before the district court and the order of civil contempt was discharged (Pet. App. 92a).

<sup>2</sup>A copy of the order of civil contempt is set forth in the Appendix, *infra*.

<sup>3</sup>The civil contempt order and certain other orders of the district court were affirmed in part and the appeals therefrom



On January 7, 1976—approximately a month before Sloan had returned to the United States—the court of appeals dismissed the appeals that are the subject of the present petition for a writ of certiorari (Pet. App. 1a-6a). The court of appeals subsequently denied petitioners' motions for reinstatement of the appeals, for reconsideration of the denial of the motion for reinstatement, and for rehearing with suggestion for rehearing *en banc* (Pet. App. 7a-10a).

#### ARGUMENT

The dismissals of petitioners' appeals and the court of appeals' refusal to reinstate the appeals after Mr. Sloan had returned to the United States and purged himself of contempt were proper and raise no important question of law that requires resolution by this Court. Moreover, the validity of the orders that were the subject of those appeals raises no important questions warranting this Court's attention.

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were dismissed in part by the court of appeals on May 10, 1976 (Pet. App. 90a-94a). *Securities and Exchange Commission v. Samuel H. Sloan, individually and d/b/a Samuel H. Sloan & Co.*, 535 F. 2d 679 (C.A. 2). A petition for rehearing, with suggestion for rehearing *en banc*, is pending (see Pet. 15-16).

On August 18, 1976, the district court dismissed as moot the Commission's enforcement action, in which the preliminary injunction had been entered (Pet. App. 95a-100a). This was the injunction of which Sloan had been held in contempt. In dismissing the action, the district court indicated that petitioners had engaged in the violations alleged in the Commission's complaint and that "summary judgment [in favor of the Commission] would [have been] appropriate" but for two events occurring after entry of the preliminary injunction: the Commission had revoked the broker-dealer registration of Sloan & Co. and had barred Mr. Sloan from association with any broker or dealer; and the Commission had examined the books and records of Sloan & Co. for the years 1971, 1972 and 1973 and ascertained that there were no records for the years 1974 and 1975 (Pet. App. 96a-97a).

1. In dismissing petitioners' appeals, the court relied upon *United States v. Sperling*, 506 F. 2d 1323 (C.A. 2), certiorari denied, 420 U.S. 962 (Pet. App. 2a, 4a, 6a). During the pendency of the appeal in *Sperling*, the United States Attorney had notified the court that one of the appellants had escaped from custody following the conviction being appealed. On the government's motion, the court indicated that it intended to dismiss the appeal with prejudice unless the appellant returned to custody within thirty days. After thirty days had passed without the appellant's return, the court entered an order dismissing the appeal with prejudice (506 F. 2d at 1345 n. 33).

Petitioners attempt to distinguish *Sperling* by pointing out that the government had sought the dismissal of the appeal in that case while the court dismissed the appeals in these cases *sua sponte*. Petitioners also note that *Sperling* was a criminal case, while these are civil actions, and claim that, in any event, the court should have reinstated the appeals or granted the petitions for rehearing after Sloan returned to the United States within thirty days of the dismissals and purged himself of contempt (Pet. 17-18).

But as this Court noted in *Molinaro v. United States*, 396 U.S. 365, 366, being a fugitive from justice "disentitles the defendant to call upon the resources of the Court for determination of his claims." Regardless of whether the government brings that status to the court's attention, or the court learns of it from some other source, there is no less an affront to the judicial processes that the defendant contemporaneously seeks to invoke.

Petitioners have not suggested any policy basis for distinguishing between civil and criminal appeals in this

regard.<sup>4</sup> Dismissal of the appeals in these cases seems particularly appropriate in view of petitioner's efforts to avoid—by going to Iceland—complying with a lawful order of the court in one case while seeking review of orders in the same and related cases. Finally, the fact that petitioner Sloan returned to the United States within 30 days of the dismissal of the appeals and purged himself of contempt did not automatically entitle petitioners to reinstatement of their appeals. Such reinstatement is within the broad discretion of the court. See *Allen v. Georgia*, 166 U.S. 138, 142, cited with approval in *Estelle v. Dorrough*, 420 U.S. 534, 537.

2. In any event, none of the appeals dismissed by the court involve an important question of law warranting this Court's attention.

a. With respect to the first case (Pet. App. 1a-2a), petitioners assert generally that the district court's findings of fact, made after trial, "were totally unsupported by the record" (Pet. 37),<sup>5</sup> that there were "faulty evidentiary rulings" (Pet. 38), and that the court's conduct of the trial was improper. The latter assertion relates principally to rulings designed to avoid delaying the trial (Pet. 38-39). None of these assertions involves

<sup>4</sup>Cf. *Tobin v. Casaus*, 128 Cal. App. 2d 588, 592, 275 P. 2d 792, 794 (Dist. Ct. of App.), which held that an appeal in a civil suit should be dismissed where the appellant "with knowledge that he [was] being sought pursuant to court process, absent[ed] himself \* \* \*."

<sup>5</sup>Petitioners have advanced similar claims in their appeal from the order of the Commission that revoked the broker-dealer registration of Sloan & Co. and barred Mr. Sloan from association with any broker or dealer (see Pet. App. 97a). That order was affirmed on November 18, 1976 in *Sloan v. Securities and Exchange Commission*, C.A. 2, No. 75-4087.

an issue of sufficient importance to warrant review by this Court.

b. The appeal in the second case sought review of the district court's refusal to permit Mr. Sloan to intervene in an enforcement action that had been brought by the Commission (Pet. App. 3a-4a). The court's decision was in accord with two previous decisions of the court below (*Securities and Exchange Commission v. Everest Management Corp.*, 475 F. 2d 1236 (C.A. 2); *Securities and Exchange Commission v. General Host Corporation*, 508 F. 2d 1332 (C.A. 2)), and was proper. As the court pointed out in *Securities and Exchange Commission v. Everest Management Corp.*, *supra*, 475 F. 2d at 1240:

Already complicated securities cases would become more confused and complex [if intervention were permitted]. The SEC can bring the large number of enforcement actions it does only because in all but a few cases consent decrees are entered. The intervention of a private plaintiff might tend to discourage or at least to complicate efforts to obtain a consent decree. We hold that the complicating effect of the additional issues and the additional parties outweighs any advantage of a single disposition of the common issues.<sup>6</sup>

<sup>6</sup>This holding reflected considerations similar to those reflected in Section 21(g) of the Securities Exchange Act (15 U.S.C. (Supp. V) 78u(g)), which became effective on June 4, 1976 (Securities Acts Amendments of 1975, Pub. L. 94-29, 99 Stat. 155). That section provides in pertinent part that "no action for equitable relief instituted by the Commission pursuant to the securities laws shall be consolidated or coordinated with other actions not brought by the Commission, even though such other actions may involve common questions of fact, unless such consolidation is consented to by the Commission."

c. The third case of which review is sought (Pet. App. 5a-6a) was dismissed by the district court as moot (Pet. 16; Pet. App. 95a-100a). The issues petitioners seek to raise concerning the weight the Commission gave to the preliminary injunction entered by the district court (see Pet. 16) were involved in petitioners' appeal from the Commission's order revoking the Company's registration and barring Sloan from further association with any broker or dealer, which order the court of appeals recently upheld (see n. 5, *supra*).

#### CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,  
*Solicitor General.*

DAVID FERBER,  
*Solicitor to the Commission,*

FREDERICK B. WADE,  
*Attorney,*  
*Securities and Exchange Commission.*

NOVEMBER 1976.

#### APPENDIX A

#### UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

#### SECURITIES AND EXCHANGE COMMISSION

Plaintiff,  
-against -

SAMUEL H. SLOAN, Individually and d/b/a  
SAMUEL H. SLOAN & CO.

Defendants.

74 Civil 5729 (RJW)

#### ORDER OF CIVIL CONTEMPT

Plaintiff Securities and Exchange Commission ("Commission") having moved by notice of motion dated March 24, 1975 for an order of civil contempt against Samuel H. Sloan ("Sloan") and having submitted an affidavit and a memorandum of law in support thereof, and the Court having filed a Memorandum dated July 22, 1975, and it being established to the satisfaction of the Court that:

1. On December 30, 1974 plaintiff Commission filed a Complaint seeking preliminary and permanent injunctions and certain other relief against the defendants. On that date the Court ordered defendants Sloan and Samuel H. Sloan & Co. ("Sloan & Co.") to permit immediate examination in an easily accessible place by examiners and other representatives of the Commission of the books and records of Sloan and Sloan & Co.



2. On January 8, 1975, the Honorable Thomas P. Griesa, United States District Judge, extended said order up to and including January 17, 1975.

3. On January 17, 1975, the Court held an evidentiary hearing on the Commission's application for a preliminary injunction, and issued an Order of Injunction ordering, *inter alia*, Sloan and Sloan & Co. to permit immediate examination in an easily accessible place by examiners and other representatives of the Commission of the books and records of Sloan and Sloan & Co.

4. On January 20, 1975 the defendants filed a notice of appeal to the United States Court of Appeals for the Second Circuit from said Order of Injunction and moved the Court of Appeals by notice of motion filed January 23, 1975 for a stay of said Order of Injunction pending appeal. The Court of Appeals denied the defendants' motion for a stay on February 13, 1975.

5. The defendant Sloan refused to permit examiners of the Commission to inspect the books and records of Sloan & Co., and the Commission moved by notice of motion dated March 24, 1975 to adjudge Sloan in contempt of this Court for wilful violation of the Court's Order of Injunction dated January 17, 1975.

6. The Court filed its memorandum dated July 22, 1975 in which it was found that the defendant Sloan wilfully violated this Court's order of preliminary injunction dated January 17, 1975 by refusing to permit inspection of the books and records of Samuel H. Sloan & Co., by representatives of the Commission.

7. Defendant Sloan moved by notice of motion dated July 28, 1975 for, *inter alia*, reargument of this Court's decision of July 22, 1975 and for a hearing and/or trial by jury on the motion for contempt. On August 18, 1975 the Court filed its memorandum denying said motion.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant Sloan is in civil contempt of this Court for wilful failure to comply with the Order of Injunction dated January 17, 1975 by refusing to permit immediate examination in an easily accessible place by examiners and other representatives of the Commission of the books and records of Sloan & Co., and it is further

ORDERED, ADJUDGED AND DECREED that the defendant Sloan be and he is hereby granted twenty (20) days from date of this Order within which to purge his contempt by permitting immediate examination in an easily accessible place by examiners and other representatives of the Commission of the books and records of Sloan & Co., and it is further

ORDERED, that defendant Sloan appear before this Court on the 26TH day of SEPTEMBER, 1975, at 2:15 o'clock in the afternoon, in Room 906 of the United States Courthouse, Foley Square, New York, New York, for sentencing and it is further

ORDERED that, in the event the defendant Sloan fails to appear before the Court on the date above indicated, the Commission is authorized to serve a certified copy of this Order of Civil Contempt upon the United States Marshal, and the United States Marshal shall, upon receipt of a certified copy of this Order of Civil Contempt, arrest Samuel H. Sloan and confine him to the Metropolitan Correctional Center, 150 Park Row, New York, New York, until he permits immediate examination in an easily accessible place by examiners and other representatives of the Commission of the books and records of Sloan & Co.

Dated: New York, New York  
September 3, 1975

(signed) Robert J. Ward

UNITED STATES DISTRICT JUDGE